the civil law and the mexican legal system

javier jiménez gutiérrez

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a word of caution to common law lawyers

Javier Jiménez Gutiérrez
Curtis, Mallet-Prevost, Colt & Mosle LLP

Before attempting to understand how Mexican law, or any specific area of Mexican law, functions, a US jurist should reflect upon the differences between the Mexican and US systems of law. Mexican law and US law are the products of two very different legal traditions. Great differences exist between these traditions and "legal training and law practice in one country is more likely to hinder rather than aid United States and Mexican lawyers in understanding their neighbor's legal system."[1] This article tries to provide a brief description of these differences, so that the US practitioners may be better prepared to understand whatever substantive aspect of Mexican law he or she needs to address. The first section of this article provides a general account of the differences and similarities between Civil Law systems, of which the Mexican system is an example, and Common Law systems, of which the United States is an example. The article then addresses some particularities of the Mexican political system that, because of their apparent similarities with the US system, might be especially confusing for a US lawyer.

a. the civil law: a different legal tradition.

a.i. historical differences between the civil law and the common law.

Mexican law is part of the legal tradition that originated in Roman Law, at least insofar as private law is concerned, and that developed in Continental Europe in a manner very different from that in which the Common Law developed in England. This legal tradition, which is confusingly referred to as the "Civil Law,"[2] rather than Roman Law, by Common Law lawyers, and the Common Law itself constitute the two most important legal traditions of the Western world, although we can safely consider the Civil Law to be the "oldest, most widely distributed and most influential of them."[3]

How there came to be different legal traditions in Continental Europe and in England has been the subject of vast legal literature. Arthur von Mehren, a leading authority in the field of comparative law, suggests that the differences between the two traditions arose mainly because of two events that occurred between the years 1066 and 1200. The first of these was the Norman conquest of England, and the second the rediscovery at the end of the

eleventh century of Justinian's *Corpus Juris Civilis*,[4] and the beginning in many European universities, first at Bologna and then at many others, of legal education grounded on the *Corpus Juris Civilis*.[5]

The conditions created by the Norman conquest in England provided for the creation of an effective, centralized administration of justice, which allowed the King's Court to declare one law *common* to the whole realm. This centralization of the administration of justice contributed to the fact that in England law was developed by a very small group of judges and practitioners, to the exclusion of other groups such as legal scholars. As a result, English universities were prevented from playing the influential role in the formation of English law that the Continental European universities played in the formation of the legal systems of their various countries. Because the legal rules relevant to the practice of law were mainly a product of the Court's administration of justice, by the end of the thirteenth century English law was controlled by a professional elite, which enjoyed a monopoly of the knowledge required for the practice of law. To these practitioners, law was a profession and not the science it would have been to legal scholars and academics. The practitioners were concerned with particular cases and not with the systematization of the legal order as a whole. Their task was to predict or influence the outcome of legal controversies and they did so by basing their assumptions on the way the King's Court had resolved similar cases in the past. English legal analysis became the art of deriving precedents from among previously decided cases, and judicial decisions, therefore, became the Common Law's principal source of law.

Law developed very differently in Continental Europe. Legal unity was not achieved there until the nineteenth century, and "scholars in the universities had developed from the twelfth Century onwards a legal science derived from the efforts of jurists to make the *Corpus Juris Civilis* understandable and useful for their economies and societies."[6] The revival of the Roman Law, combined with the naturally academic character of European legal scholarship, resulted in the fact that legal study in the European universities became more concerned with the systematization and coherence of the legal order than with the outcome of particular legal disputes. European scholars were less interested in evolving case law than they were in the development of coherent systems of law composed of general, obligatory rules that would not only predict but in fact dictate judicial solutions to particular controversies. This emphasis on structure could only have been achieved through codification. By the nineteenth century Continental Europe was ready for national legal unity. The figure of the code, a legislated text intended to constitute a comprehensive and systematic body of law that would provide solutions to all problems in a particular area, became the primary instrument to achieve such unity.

a.ii. current differences and similarities between the civil law and the common law.

On the basis of the preceding description of the development of the Common Law and the Civil Law legal traditions, the main difference between them should be evident: the Common Law is mainly judge-made law, whereas Civil Law systems are based mainly on legislation. Nonetheless, this distinction should not be taken too literally. The Common Law tradition does rely on legislation, through statutes, to correct and supplement judge-created law. The Civil Law tradition also relies on judicial decisions in order to clarify obscure or uncertain aspects of legislation. Nevertheless, the nature of the statute in the Common Law cannot be compared with that of the code

in the Civil Law tradition. Nor can the use of judicial decisions in the Civil Law, as a very secondary source of law, be compared with the importance given to the judiciary in the formation of the Common Law. Therefore, the characterization of the Common Law as judge-created law, and of the Civil Law as legislated law, although incorrect if taken too literally, does provide a useful description of how these different systems of law evolved.

Although historically we can describe the Civil Law and the Common Law as two very different systems of law, it is important to point out the increasing convergence of the two systems. Common Law countries such as the United States appear to be increasingly employing codification techniques. For example, some areas of US commercial law now are governed by codified rules.[7] In recent times, statutory law in the United States has spread significantly. Even those areas of US law that have traditionally been at the core of the Common Law, such as the law of contracts or the law of torts, have felt the influence of the Civil Law through the increasing use of unofficial compilations such as the Restatements.[8] Legislation has become such an important source of law in the US that to insist on its secondary character or to deny the increasing influence of the Civil Law in the evolution of US law would be misleading.

But if the two systems are now becoming more alike, why do we still insist on their historical differences? Why do we still caution lawyers from one system when they approach and try to understand the other? The answer is simple. Notwithstanding oth7.717 rhng tandinl la0w,

solution to a case is thought to be the necessary conclusion of this logical operation. In those rare instances in which a particular case is not covered by the highly detailed framework of legislated rules, most Civil Law systems contain explicit provisions prescribing guidelines to the judge as to how to proceed, guidelines which might include the following usages and general principles of law. However, these cases are truly extraordinary, for the vast majority of cases are believed to be covered by the great framework of legislated rules, either in explicit provisions or by reasoning by analogy, by *mayoría de razón* or *a contrario sensu*.[11]

These different methods of legal reasoning make the Civil Law and the Common Law systems two very different legal phenomena. These are not merely two different ways of achieving the same result, but two very different ways of analyzing legal problems that often will lead, if confronted with the same situation, to very different solutions. To a Common Law lawyer, the syllogistic method of the Civil Law seems to be a rigid and inflexible piece of machinery to be operated mechanically by the judge.[12] On the other hand, to the Civil Law lawyer, the Common Law appears to be an unorganized collection of judicial decisions that can be interpreted by judges in very different and subjective ways (*i.e.*, sometimes broadly, sometimes narrowly; sometimes literally, sometimes in light of the policies and purposes behind them), in order to derive from them very different and often contradictory rules and results.[13]

This difference in the technique of legal analysis is often the cause of great misunderstanding between Civil Law and Common Law lawyers. Trying to understand a particular area of law within a Civil Law system can be very frustrating for a Common Law lawyer if he or she insists in thinking in Common Law terms and does not learn how the "machinery" of the Civil Law works, that is, if he or she does not learn the particular methods of Civil Law legal reasoning.

a.iii. legal analysis in the civil law.

The first step towards learning an area of law within a Civil Law system is to become acquainted with the legal framework that governs it. However, once a Common Law lawyer becomes familiar with the framework of legal rules that governs a particular area of law within a Civil Law system, he or she will begin to realize that legal thinking in the Civil Law is not as mechanical as it seems at first sight. Although the great majority of solutions is usually found within the framework of legislated rules, often these rules may appear to contradict each other. Statutes will seem to contradict other statutes. Sometimes the meaning of an explicit code provision will seem different when analyzed by itself than when looked at in conjunction with other provisions of the very same code. In these circumstances, if the Common Law lawyer does not learn to analyze law in a Civil Law style, he or she is likely to feel lost by the absence of "leading cases."

However, unlike in the Common Law, ambiguities in the Civil Law are not resolved in light of "leading cases," but by means of a method of legal reasoning that involves certain techniques of interpretation and certain principles designed to resolve conflicts among rules within the system. The techniques of interpretation seek to determine which, if any, of the various provisions of the system covers the specific facts of a particular case. The principles try

to determine, in cases in which various conflicting legal rules seem to apply simultaneously, which one should prevail.

a.iii(a) techniques of interpretation in the civil law.

The first thing one must do when analyzing a legal problem in the Civil Law is to determine whether the facts of the particular case are covered by a specific rule. In order to do this, one must first interpret all the legal rules that are possibly applicable as literally as possible. If one does not find an answer through the literal interpretation of the relevant rules, then one must refer to one of the other interpretative methods of the Civil law, such as reasoning *a contrario sensu*, by analogy or by *mayoría de razón*.

A contrario sensu is a method of interpretation that consists in considering that the fact situation directly opposed to the one expressly covered by the legal provision in question is governed by the rule directly opposed to said legal provision. Thus, for example, if we find a legal rule in a particular system that states that one must obtain a permit from the corresponding authority in order to legally store more than 5 tons of hazardous waste, it would follow by reasoning *a contrario sensu* that one does not need such a permit in order to store less than 5 tons of such waste. However, it should be noted that this method of interpretation must be used carefully. Legal provisions often refer explicitly to certain fact situations as mere examples of general categories. Often, laws are not designed to cover only the fact situations to which they expressly refer, but also to cover similar situations or other circumstances that with even more reason should be covered by the same principle. In either of these cases, one cannot use the *a contrario sensu* method of interpretation. Rather one must turn to interpretation by analogy or by *mayoría de razón*.

Interpretation by analogy consists in applying a legal rule provided to cover a specific fact situation to another fact situation that is not covered by any provision in the legal system, but that because of its similarity to the fact situation that is covered by the rule can be treated in a similar way without upsetting principles of equality. The following is a simplistic but illustrative example. Suppose that there is a legal rule in a particular system that forbids the use of public buses to anyone accompanied by a dog. Literally speaking, the rule only refers to persons with dogs but says nothing about persons carrying other sorts of pets. Suppose that a man with a cat wishes to use a public bus. Through a literal interpretation of the rule one would only come to the conclusion that persons with dogs are not allowed to use public buses. Through *a contrario sensu* interpretation, one would conclude that anyone not carrying a dog may use public buses. On the basis of any of these two methods of interpretation we would have to agree that the cat carrier should be allowed to use the public bus. Nevertheless, a judge confronted with this situation might consider that the purpose behind the rule is to protect the safety and comfort of other passengers on the bus, and that a cat can jeopardize the safety and disrupt the comfort of the passengers just as much as a dog. The judge can then by analogy apply the rule provided for persons with dogs to persons with cats.

Interpretation by *mayoría de razón* consists in applying a legal rule provided for a specific fact situation to another fact situation that is not covered by any provision in the system, but that would produce to a greater extent the effect that the rule is trying to avoid. Allow us to return to our example of the buses and the dogs. Let us suppose that this time a man accompanied by his pet lion wishes to board a public bus. Through a literal and *a contrario*

sensu interpretation of the rule, one would conclude that the only persons forbidden to use public buses are those accompanied by dogs, and that anybody not carrying a dog should be allowed to use a public bus. However, a judge confronted with this situation again might consider that the rule's purpose is to protect the safety and comfort of the passengers, and that a lion would pose a greater threat than a dog. The judge can then by use of the *mayoría de razón* principle apply the rule that was originally intended for persons with dogs to persons with lions.

a.iii(b) principles for resolving conflicts of rules within a civil law system.

After interpreting all the relevant legal rules within the system, one might come to the conclusion that several of them appear to apply to a particular case. The problem then becomes one of determining which of the several rules should govern. Here again, one is guided by a set of principles to resolve these conflicts of rules. We will describe briefly three of these principles. The first one states that the law of superior hierarchy prevails over a law of lesser hierarchy. We may call this the principle of hierarchy. The second one states that a specific law will take precedence over a general law. This may be called the principle of specificity. The third principle is based on the old Roman maxim according to which a *lex posterior derogat priori*.

The principle of hierarchy originates in the fact that each Civil Law system is composed of a framework of rules of differing levels. In Kelsenian terms, we can conceive of a Civil Law system as a pyramid at the top of which is the Constitution, which is the fundamental and supreme law. The Constitution typically contains rules relating to the form of government, the branches of the State, the powers of each branch of the State and a bill of rights. The powers of the State include the power to legislate. Typically, this power is given exclusively to the legislature which enacts all laws and codes that conform the second level of hierarchy in the Kelsenian pyramid. Due to their subordinate position with respect to the Constitution, these laws may not contradict it in any way. Any conflict between any of these laws or codes and any provision of the Constitution is resolved in favor of the latter.

Among the branches of the State we normally find an Executive Branch in charge of providing for compliance with the laws and codes enacted by the legislature. The Executive Branch is usually vested with the power to issue regulations that develop in further detail the provisions of the laws that they are designed to regulate. The regulations so enacted represent the third level of hierarchy of the pyramid. These regulations may not exceed the scope of the law that they regulate, nor may they in any way contradict or be inconsistent with that law, any other law or the Constitution. Any conflict between these regulations and any other body of law of higher hierarchy will be resolved in favor of the latter.

Often the problem of conflicting rules will not be a problem of hierarchy. Two contradictory rules of the same hierarchy may seem to apply to the same fact situation. In such a case, one must resort to the principle of specificity. According to this principle, where two contradictory rules of the same hierarchy appear to apply, the rule that will govern will be that which is more directly related to the specific subject matter of the case in question. For example, if a judge is confronted with a case concerning environmental liability, and in the particular legal system an environmental law has provisions regarding environmental liability that contradict the general liability provisions

of the civil code, then the specific provisions of the environmental law will take precedence over the general and otherwise applicable rules of the civil code.

But what to do if two legal rules of the same hierarchy, that deal with the very same matter, contradict each other? Here, one must apply the old Roman principle according to which *lex posterior derogat priori*. According to this principle, a later statute takes precedence over a prior one. However, this principle must also be carefully applied. If the derogation of the prior law is not expressly provided for in the new law, the prior law will become ineffective only to the extent that it contradicts the later law. Merely treating a matter differently does not render the prior law ineffective. A total incompatibility between the provisions of the earlier law and the provisions of the later law must exist in order for the former to be tacitly derogated by the latter.

This kind of legal reasoning is typical of the Civil Law method. A Civil Law lawyer must know the framework of legal rules that comprise the area of law with which he or she is dealing and then master these principles and techniques to make them work for his cause. A lawyer must use these principles to convince the judge that one provision must be applied to his case and not another. He must use these interpretative techniques to convince the judge that his case falls within the scope of a certain provision, if not expressly, then by analogy or by *mayoría de razón*. Or he must argue, using these same techniques, that the provision does not apply to his case. This kind of argumentation is very different from that which a lawyer would use in the Common Law tradition, where he is aided by the authority of precedents. In the Civil Law, precedents are of a much more modest importance, and lawyers are left to argue their cases aided only by their knowledge and ability to handle the detailed framework of legal rules that comprise the legal system.

b. the mexican political system.

Until now we have only addressed some of the sources of confusion that can arise for a lawyer trained in the Common Law when trying to understand a particular area of any Civil Law system. However, in the specific case of the Mexican legal system, there is an additional source of possible confusion, which, ironically enough, derives from the apparent similarities between the US and Mexican political systems. The Mexican political system is in theory so similar, and in practice so different, from that of the US that a minimum understanding of its particularities is necessary to avoid confusion. For example, principles of political structure such as federalism or division of powers, which may sound so familiar to a US lawyer, work quite differently under Mexican law. The following is a brief discussion of how federalism and division of powers function in Mexico, and should work as a word of caution to US lawyers about how political structures function differently in different settings and how that can make a difference in legal analysis.

b.i. mexican federalism.

Although the Mexican and US legal systems have very different origins, their political systems share a very similar background. Following Mexico's independence from Spain, the drafters of the first Mexican Constitution in 1824 were greatly influenced by the ideals of the French Revolution and the American Constitution of 1787. Mexico's

first constitution adopted the form of a republican federation. If establishing a republic was a logical step for a new nation seeking to break away from centuries of submission to the Spanish monarchy, the establishment of a strong federal system did not prove to be so easy. Unlike the United States, Mexico was not born from among a group of colonies independent from each other that decided to unite to form a new nation, one for which federalism would have been a natural consequence. Mexico had a centuries-old history of highly centralized Spanish administration and its provinces were used to blind obedience to a central government. The adoption of the federal system in Mexico had more to do with the political trends of the time than with a normal historical evolution. For this reason, and for nearly a century after its independence, Mexican political life was characterized by an acrimonious debate during which the form of government alternated between federalist and centralized structures. Nevertheless, tradition notwithstanding, Mexican federalism eventually became permanently established in the Constitution of 1917, which is still in effect today.

The consequence of establishing a federal system against a long-standing tradition of centralized government was the creation of a *sui generis* federalism. Mexican federalism in theory respects the sovereignty of the states with respect to matters of merely state interest, but in practice is based on an overwhelmingly strong federal government. In the first section of this article we saw that much of legal analysis in a Civil Law system involves resolving conflicts of legal rules within the system. In a federal system, these conflicts can arise between federal laws and state laws. The overwhelmingly centralist reality of Mexican federalism stands in strong contrast with the theoretical foundations set forth in the Constitution. This breach between theory and practice can easily mislead when trying to resolve conflicts between state and federal legislation. This can be particularly problematic in areas which involve both federal and state legislation. We now turn to a brief analysis of both the theory and practice of Mexican federalism.

According to the Federal Constitution, the United Mexican States is a democratic and republican federation composed of a federal government divided into three branches (Executive, Legislative and Judicial) and by separate and independent states. Each state has its own constitution and government that operates under principles of separation of powers that very much imitate those of the federal government. In addition, each state has its own local legislature with the power to legislate in all areas that are not entrusted by the Federal Constitution to the federal legislature. Each state has an executive branch that is entrusted to a governor that enjoys, in the local sphere, powers that are very similar to those held by the President as holder of the Federal executive power at the national level. Finally, each state has a Judiciary that oversees state judicial matters, just as federal controversies are resolved by the federal judicial system.

The Mexican legal system is, thus, divided into two spheres: federal and state law. At the top of the system is the Federal Constitution, which is the law of highest hierarchy, and in which we find rules relating to the form of government of the Federation, the branches of the Federal government and their corresponding powers, a bill of rights that must be respected by both the Federal and state governments, the basic requirements that must be satisfied by state governments and which are developed in further detail by state constitutions, and the basis for the division between federal and state jurisdictions.

Below the Mexican Constitution, in the Federal sphere, we find federal laws (and codes) that are enacted by the federal legislature in accordance with the Constitution. Below federal laws come the regulations enacted by the Federal Executive Branch that develop in further detail the provisions of such federal laws. In accordance with the principle of hierarchy described in section A.III.B. above, any conflicts between federal regulations and federal laws must be resolved in favor of the latter, and any conflicts between federal laws and the Federal Constitution must be resolved in favor of the Federal Constitution.

Below the Federal Constitution, in the state sphere, we find the state constitutions. These state constitutions contain the form of government of each state, the branches of the state government and their respective powers, and a bill of rights that in most cases is a transcription of the Federal bill of rights. Below the State Constitution we find state laws that are enacted by the state legislature in accordance with the state constitution. Below such state laws we find the regulations enacted by the state executive branch that develop in further detail the provisions of such state laws. In accordance with the principle of hierarchy described above, any conflicts between state regulations and state laws must be resolved in favor of the latter, any conflicts between state laws and the state constitution must be resolved in favor of the state constitution, and any conflicts between the state constitution and the Federal Constitution must be resolved in favor of the federal document.

In theory, the Federal Constitution establishes federal and state spheres that have parallel and separate areas of jurisdiction. Imitating the US model, Mexican federalism is based on the fiction that the Federation was born on the basis of a pact among preexisting states that decided to transfer certain specific and limited powers to a central government.[14] Accordingly, the Federal Government is one of enumerated powers and the powers not expressly entrusted to it by the Federal Constitution are understood to be reserved to the States.[15] Technically, any conflict between Federal and state legislation is a matter of jurisdiction, not of hierarchy. If the subject matter of the particular case corresponds to one of the powers expressly entrusted by the Federal Constitution to the Federal government, then the conflict must be resolved in favor of the Federal law. If the conflict regards a matter that is not expressly entrusted to the Federal government by the Federal Constitution, then the State law should prevail and the federal law should be struck down for lack of jurisdiction. In practice, however, federal legislation is almost always upheld, even to the detriment of state legislation, and even in cases where the subject matter of the law is not expressly entrusted to the Federal government.

As noted above, this subordination of state to Federal legislation is based on the long tradition of obedience to a central government that has prevailed all throughout Mexican history. The legal argument given to justify this subordination is based on two provisions of the Federal Constitution. Article 73, section XXX, which empowers the Federal Congress to enact any laws necessary to the fulfillment of any of the powers vested in the Federal Government, is used in practice to justify any law enacted by the Federal Congress, even if such law bears no evident relation to any of the explicit powers of the Federal Government. Article 134 of the Federal Constitution, which binds the state judiciaries to follow Federal law in all cases, including cases in which federal law conflicts with state law, is used to uphold all federal law whether or not enacted within the proper scope of federal authority. Although these interpretations of Articles 73, section XXX, and 134 are unpersuasive, the little interest that the states have shown in protecting themselves from federal intrusion has made them sufficient to justify in formal terms the

de facto omnipotence of the Federal Government within the Mexican federal system. One should be aware of these special characteristics of Mexican federalism when dealing with any area of law which involves both federal and state jurisdiction.

b.ii. mexican division of powers.

Another principle of the Mexican political structure that may result in confusion to US attorneys because of its apparent similarities with the US model is the principle of division of powers. According to article 49 of the Mexican Constitution, the Federal Government is divided into an Executive Branch, a Legislative Branch and a Judicial Branch. The Executive Branch is held by a single individual, the President, who is the Chief of State and Government and embodies all authority conferred to the Executive by the Constitution. He is elected through direct vote for a six-year term and may not be reelected for additional terms. He has the power to appoint and remove all Secretaries of State and other federal officials. He has the faculty to propose laws to the Legislative Branch, promulgate and enforce laws enacted by said Branch and issue regulations that develop in further detail the provisions of said laws. He also enjoys broad powers in the conduction of foreign affairs and is the head of the armed forces. The Legislative Branch is divided into two houses, the Chamber of Deputies and the Chamber of Senators. Its powers include legislation in all federal matters. The Judicial Branch is a three-tired organization at the top of which is the Mexican Supreme Court.

The description above should not sound too unusual to the US attorney. Mexican division of powers is also inspired in the ideas of Lock and Montesquieu and its structure is not too different from the US model. In theory, it should provide for a system of checks and balances much like the one in the United States. In practice, however, Mexican tradition provided, at least until very recently, for a strong presidentialism in which the Executive Branch outweighted the other powers.

In theory, laws may be proposed by the President, by individual deputies and senators and by the legislatures of the States. In practice, most legislation has historically been initiated by the President and up to very recently it seldom encountered a strong opposition in the legislature For over most of the twentieth century, Mexico was ruled by the PRI party, which not only won all presidential elections during such time but also held a majority in Congress. Such overwhelming control by a single party created significant distortions in our systems of checks and balances giving the President and his party an almost unlimited power which, paraphrasing Mexican historian Enrique Krauze, we can refer to as *presidencialismo imperial*.

This began to change in the year 2000, where for the first time in over 75 years Mexico elected as president a candidate from a party other than the PRI, the PAN. Today Mexico has a president from the PAN and the Congress is divided between 3 major parties: the PRI, the PAN, and the PRD (a left-wing party that spun off from the PRI in the 1980s), with a small representation by other minor parties. The fact that Mexico does not have a bipartisan system like the US has also presented some problems in our new political climate. In a bipartisan system there is always, by definition, a party that has a majority in congress. In Mexico the existence of three strong parties (none

of which has a majority in Congress) has made it difficult to pass laws on issues were these parties have different views, creating a paralysis in some very important issues.

The winds of change have not only affected the relationship between the Executive Branch and the Legislative but also the relationship between these branches and the Judiciary. Historically, the Mexican Supreme Court has not enjoyed a power comparable to that of the US Supreme Court. This is attributable to two fundamental reasons. The first reason should be evident by the discussion in the first part of this article in which we explained the lesser role that the judiciary plays in the formation of the law in a Civil Law system such as the Mexican system. In the Civil Law, the formation of the law is left mainly to the legislative branch, and we have just mentioned how up to very recently it was dominated by the Executive. The second reason has to do with the powers that actual precedents (not the power to issue binding precedents but the content of the precedents themselves) have given to the Judiciary in the US and that have no parallel in the Mexican system.

When in 1803, in the case of *Marbury v. Madison*, it was determined that "it was emphatically the province and the duty of the judicial department to say what the law is," the US Supreme Court was afforded the power of judicial review and with it the faculty to strike down entirely, with effects *erga omnes*, any law or act of government which violates the constitution. Historically, the Mexican Judicial Branch did not have such a power. The control of constitutionality was one of its functions, but it had to perform it through the figure of the *amparo*. Through a writ of amparo, any person whose constitutional rights are violated by a law or any other act of government may request the protection of the Judiciary. If granted, the *amparo* protects the claimant from the application of the law or act in question but it does not have effects with respect to third parties. The law or act in question remains in effect and may be applied to others. This limit in the power of the Mexican Supreme Court prevented the judiciary from playing the role it plays in the US and for a long time was an obstacle for acting as a counterweight to the strong Executive Branch that we historically had. Due to the above, Mexico implemented in 1994 a constitutional reform with the purpose of strengthening our judicial branch.[16] Through that reform, the Mexican Supreme Court was afforded for the first time the faculty to strike down completely, with effects *erga omnes*, any federal law which violates the constitution and is challenged by the federal legislature (through a vote of at least 33% of the deputies or 33% of the senators), any state law which violates the constitution and is challenged by the state legislature (through a vote of at least 33%), any federal or state law which is challenged by the Federal Executive Branch, or any electoral law that is challenged by an official political party. The Mexican Supreme Court was also afforded the faculty to give *erga omnes* effects to resolutions resolving a constitutional controversy between the Federal Government and the States, between two or more States or between the different branches of a State government.

Although the 1994 reform significantly strengthened the powers of our Judiciary, its still did not afford it with powers comparable to the ones held by the US Supreme Court. First of all, the Mexican Supreme Court can only issue resolutions with *erga omnes* effects in cases brought by government authorities and by political parties. It can not do so, like the US Supreme Court, in cases brought by private parties, which are still resolved through *amparos*. Secondly, in order for a resolution of the Mexican Supreme Court to have *erga omnes* effects, it must be adopted by the affirmative vote of at least 8 of its 13 members. A simple majority is not enough. Notwithstanding the above,

the Mexican Supreme Court has in fact flexed its muscles and used its new powers to bring down important acts by the Executive Branch.

In the last decade we have rapidly moved from a system where it was all too easy for the ruling party to pass legislation at will to a system where the President has argued that he has found it impossible to implement reforms that are necessary for the most basic policies of his administration. Whether this is just a political justification for lack of results or whether it means that we are yet to find an efficient system of checks and balances is the subject of debate. I believe that the role that comparative jurisprudence is call to play in the analysis of such debate and in the adoption of further changes in Mexico is of the utmost importance. Just as the Common Law has benefited by the experience of Civil Law systems through the adoption of codification techniques, we can turn to Common Law systems and learn from their institutions and experiences. That is why both for US and Mexican lawyers understanding their neighbor's legal system is of great benefit, despite the difficulties and efforts that the differences between the two systems may imply.

about the author:

javier jiménez gutiérrez

Mr. Jiménez, partner to Curtis' associated firm in Mexico, Curtis, Mallet-Prevost, Colt & Mosle, S.C. and Curtis, Mallet-Prevost, Colt & Mosle LLP, joined the Firm as an associate in 1993, after completing a one-year clerkship at the Supreme Tribunal of Justice of México City. He has taught law at the Universidad Latinoamericana in México City. Mr. Jiménez has experience in corporate transactions, privatizations and project finance, as well as labor issues. His project finance experience includes oil industry projects involving crude oil storage facilities (including offshore storage facilities), gasoline storage facilities, LPG storage facilities and natural gas pipelines, as well as various transactions in the power industry.

Email: jjiménez@cm-p.com
Tel: + 011 52.55.5282.04.44

Reference:

[1] Smith, James F., "Confronting Differences in the United States and Mexican Legal Systems In the Era of NAFTA," United States-Mexico Law Journal, Symposium, 1993.

[2] The term "Civil Law," when applied to describe the legal tradition that originates in Roman Law, as opposed to the Common Law, can be confusing, especially in comparative jurisprudence. A jurist trained in a "Civil Law" system is likely to use the term not to describe such a legal tradition but to refer to that area of private law that includes the law of persons, family law, inheritance, property and non-commercial obligations. To refer to the "Civil Law" legal tradition, a "Civil Law" lawyer might be more likely to use terms such as "Systems of Codified Law" or "Systems of Romanist Tradition." Nevertheless, in order to avoid confusion for Common Law trained lawyers, to whom this article is primarily directed, we will use the term "Civil Law" to refer to the legal tradition that finds its beginnings in Roman Law.

[3] Merryman, John Henry, "The Civil Law Tradition," p. 1, Stanford University Press, 1969.

[4] The *Corpus Juris Civilis* is the compilation and codification of the body of Roman law that was made under the direction of Emperor Justinian, in A.D. 528-534.

[5] Von Mehren, Arthur Taylor, "Law in the United States: a General and Comparative View," pp. 3-9, Kluwer Law and Taxation Publishers, 1988.

[6] Von Mehren, Arthur Taylor, "Law in the United States: a General and Comparative View," p. 5, Kluwer Law and Taxation Publishers, 1988.

[7] In the specific case of commercial law, in the United States generally the governing body of law is the Uniform Commercial Code.

[8] The Restatements of Law are volumes published by the American Law Institute and authored by leading scholars in each field, that set forth in a comprehensive and systematic way, much as a code would do in a Civil Law country, what the law is in a specific field. Although they are only unofficial compilations, their persuasive authority has played a great influence in the administration of justice.

[9] García Máynez, Eduardo, "Introducción al Estudio del Derecho," pp. 321-322, Porrúa, México, 1988.

[10] Bridge, Willam J. *et al.*, " A Different Legal System," in "Doing Business in Mexico," 1992.

[11] We will later analyze the methods of reasoning by analogy, *by mayoría de razón* and *a contrario sensu*.

[12] Merryman, John Henry, "The Civil Law Tradition," p. 38, Stanford University Press, 1969.

[13] This image of the Common Law as a malleable system is by no means the exclusive opinion of Civil Law jurists. Important movements in American legal thought, such as the Realism of the 1930s and the more recent movement known as Critical Legal Studies, have based their theories on this conception.

[14] See Tena Ramírez, Felipe, "Derecho Constitucional Mexicano," p. 113, Porrúa, México, 1985.

[15] Article 124 of the Mexican Federal Constitution.

[16] The constitutional reforms were published in the Official Gazette of the Federation, December 31, 1994.